Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

ANTOINE M. SAACKS, JR.,
Petitioner,

v.

CITY OF NEW ORLEANS, NEW ORLEANS POLICE DEPARTMENT, AND JOSEPH ORTICKE IN HIS CAPACITY AS CHIEF OF POLICE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT AND THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prior to his termination, Deputy Chief Antoine Saacks, a classified civil servant, was a well-respected, decorated 28 year veteran of the New Orleans Police Department, who was serving by appointment as Assistant Superintendent of Police. The unjust and unlawful termination of Petitioner's employment presents the following questions meriting review:

1. Considering that the deciding vote terminating Petitioner's employment was cast by a Commissioner engaged in lucrative employment as counsel for the City, was the Court of Appeal's decision affirming the denial of Petitioner's Motion to Recuse and the termination of his employment contrary to Amendments V and XIV of the United States Constitution; Louisiana Constitution Article I Section 2 and Article X Section 8; and numerous decisions of this Court?

2. Did the Court of Appeal's decision that the warrantless and suspicion-less search of Petitioner's office was legal contravene Amendments IV and XIV of the United States Constitution; Louisiana Constitution Article I Section 5, and numerous decisions of this Court?

3. Particularly considering that the search was conducted by law enforcement officials, was this a "special needs" case permitting a warrantless search?

4. Assuming that a warrant was not required, was the search unreasonable in its inception and its scope under this Court's decision in *O'Connor v. Ortega*,

480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987)?

5. Did New Orleans Police Department ASOP 48 permit or excuse the illegal search?

6. Considering that Saacks' alleged failure to submit Paid Detail/Outside Employment forms did not "impair the efficiency of the Department," and that failure to submit these forms was considered a minor offense, if any, does the Court of Appeal's decision that this alleged violation of ASOP 85 warranted the loss of Saacks' 28 year career contravene Amendment XIV of the United States Constitution and Louisiana Constitution Article X?

RULE 14(b) STATEMENT

All parties in the lower courts are listed in the caption of this case.

RULE 29.6 STATEMENT

Petitioner is an individual, and therefore there are no parent or subsidiary companies to be listed.

CERTIFICATE OF INTERESTED PERSONS

The following persons and entities have an interest in this suit:

1. Antoine M. Saacks, Jr., Petitioner.

2. The City of New Orleans, the New Orleans Police Department, and Joseph Orticke in his capacity as Chief of Police, Respondents.

3. Robert G. Harvey, Sr., Tamara Kluger Jacobson and Thomas Corrington, counsel for Petitioner Antoine M. Saacks, Jr.

4. Lee A. Archer, Of Counsel for Petitioner Antoine M. Saacks, Jr.

5. Ike Spears and Sonja M. Spears, counsel for Respondents City of New Orleans, the New Orleans Police Department, and Joseph Orticke in his capacity as Chief of Police.

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No. _____

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City of New Orleans, New Orleans Police Department, and Joseph Orticke in his capacity as Chief of Police,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Antoine M. Saacks, Jr., respectfully requests that a writ of certiorari issue to review the judgment of the Louisiana Fourth Circuit Court of Appeal in this case, discretionary review of which was denied by the Louisiana Supreme Court.

OPINIONS BELOW

The decision of the Louisiana Supreme Court denying review of the Court of Appeal's judgment (App. A-1) is reported at 693 So.2d 769. The Louisiana Court of Appeal's Opinion (App. A-2) is reported at 687 So.2d 432. The Decision of the New Orleans City Civil Service Commission (App. A-65) and the Reports of the Hearing Examiner (App. A-98 and A-141) are unreported.

JURISDICTION

The decision of the Louisiana Supreme Court denying review of the Court of Appeal's judgment was rendered on May 9, 1997. The jurisdiction of this Court is proper under 28

U.S.C. § 1257 and Rule 13.1 of the Rules of this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV
United States Constitution, Amendment V
United States Constitution, Amendment XIV
Louisiana Constitution, Article I § 2
Louisiana Constitution, Article I § 5
Louisiana Constitution, Article X § 8
Louisiana Code of Judicial Conduct
Louisiana State Civil Service Rule 13.32
New Orleans City Civil Service Rule 4.4
New Orleans City Civil Service Rule IX, Section 1
New Orleans Police Department ASOP 48
New Orleans Police Department ASOP 85

(See Appendix G for Text)

STATEMENT OF THE CASE

Prior to the termination of his employment, Deputy Chief Antoine Saacks, a classified civil servant, was a well respected 28 year veteran of the New Orleans Police Department. During his tenure, he rose rapidly through the ranks, and prior to the events at issue, he was appointed Assistant Superintendent of Police by the Mayor of New Orleans.

Due to the low wages paid to New Orleans Police Officers, it was quite common, and accepted, for the officers to pursue outside business interests. Most of the lower ranking police officers worked private security details, and many of the high ranking officers, including Deputy Chief Saacks, were involved with coordinating the details. Deputy Chief Saacks and his partner, Lt. L.J. Canal, owned a business called Police Security Details, Inc. ("PSD") which coordinated security details for movie production companies filming in New Orleans. Other outside business interests were not uncommon, for example, Arnesta Taylor, the Chief of

Police during Saacks' tenure, owned a grocery store, and his successor Chief Orticke owned a washateria.

In addition to his interest in PSD, Deputy Chief Saacks owned an unprofitable interest in a local sports bar. Considering his future, Saacks decided to look at other business interests. Just prior to the legalization of gambling in Louisiana, Deputy Chief Saacks, with the knowledge and blessings of then Chief Arnesta Taylor and the Mayor of New Orleans, began negotiating with a Nevada company called United Gaming, Inc., which was interested in supplying video poker machines to Louisiana businesses.

Pursuant to an oral agreement between Saacks and United Gaming, a company called Video Services, Inc. was to be formed, in which Saacks would own a $1/6^{th}$ interest, and for which he would act as a security consultant. Saacks spent many long hours of his personal time in the effort to start the new company and garner business and contacts in Louisiana for the proposed company. However, United Gaming reneged on its agreement, and informed Saacks that he would not have an interest in Video Services Inc. After Saacks indicated that he would pursue litigation for breach of contract, the parties entered into settlement negotiations, pursuant to which Saacks accepted $325,000.00 in settlement of his claims.

Anthony Radosti, a political and personal enemy of Deputy Chief Saacks, who had thrice filed baseless complaints against Saacks, seized upon the negotiations with UGI and the settlement as a means to discredit Saacks. The Metropolitan Crime Commission ("MCC") a private watchdog organization, of which Radosti was a member, wrote a scathing letter castigating Deputy Chief Saacks for his involvement with the gambling industry, and sent copies to the Mayor, the City Council and the Chief of Police. In addition, the MCC called a press conference in which it publicized its accusations against Saacks, causing a public outcry. Saacks, in return, refuted these allegations, and

explained that he had permission and approval to carry on his activities from the Police Department and the Administration.

The MCC, through the media, succeeded in inflaming and outraging the public, many of whom were vehemently opposed to gambling. Unable to take the heat, the City Administration and the new Chief of Police, Chief Orticke, decided to sacrifice Deputy Chief Saacks to the wolves.

After receiving the complaint from the MCC, Chief Orticke suspended Saacks, and referred the matter for investigation to Director Peter Munster of the Office of Municipal Investigations ("OMI"). Well aware that Saacks had a signed Paid Detail/Outside Employment form from the prior Chief permitting his activities, and that the Administration, including the Mayor, had full knowledge of his activities, the OMI investigators on the case searched for anything else they could find to discredit Saacks.

Without a warrant, and without any reasonable cause, the investigators, through a hole opened in the ceiling, broke into the offices of Deputy Chief Saacks and Lt. Canal. Searching through desks, file cabinets, briefcases and refrigerators, without any idea what they were supposed to be looking for, the investigators seized over 500 documents, including the business records for Police Security Details, Inc., which they copied. Although they alleged that they returned the originals of these documents, the originals were never found.

Following this illegal search and seizure, OMI continued its investigation of Saacks beyond the initial allegations of the MCC complaint with the documents obtained from the search. Thereafter, the OMI compiled a laundry list of alleged violations by Deputy Chief Saacks, most of which were entirely unrelated to the accusations leveled by the MCC.

On March 10, 1994, OMI's Investigative Report was completed by Senior Agent Robert Mehrtens and forwarded to Chief Orticke. On March 21, 1994, Saacks was tentatively reinstated to duty with the police department, demoted to the

rank of Police Captain, and relieved of his unclassified position as Assistant Superintendent of Police.

By a letter dated April 11, 1994 to Antoine Saacks from Chief Orticke by Henry Aschebrock of the IAD, Saacks was informed he was being charged with several violations of Departmental Rules and/or Procedures of the police department. These alleged violations went far beyond the allegations contained in the MCC complaint, and included alleged improprieties relating to Police Security Details, Inc. These alleged violations did not include a violation of General Order No. 387, which was the original basis for Saacks' suspension. However, the department reiterated its charge of a violation of ASOP 85.0 (failure to obtain a Paid Detail/Outside Employment form) which was included in the grounds for Saacks' suspension.

Proceedings Below

Saacks was instructed to appear for a disciplinary hearing on April 18, 1994 to present any mitigating circumstances or explanations. At the hearing, the charges against Saacks were read and discussed with him, but no evidence in support of the allegations was presented. Saacks denied the allegations. Contrary to normal procedure at disciplinary hearings, neither Saacks' attorney nor the representative of the police association (PANO) were permitted to speak on his behalf. A number of other irregularities occurred at the hearing. See n. 1, *infra.*

By letter dated April 19, 1994 from Chief Orticke, Saacks was advised that his employment with the New Orleans Police Department was terminated. The letter, which was prepared by Captain Henry Aschebrock of IAD, incorporated most of the laundry list of charges compiled by OMI, which were sustained by Chief Orticke following the administrative hearing. The termination letter contained the following violations:

1. Violation of Rule 2, Section 1--Adherence to Law: Failure to Obtain an Occupational License and Pay

License Tax for Police Security Detail (Chapter 70 of the City Code) and Theft (LSA-R.S. 14:67) for submission of fraudulent invoices.

2. Violation of Rule 4, Section 4--Neglect of Duty: Failure to Supervise Lt. Canal in his operation of Police Security Detail and failure to obtain Paid Detail/Outside Employment Forms for ownership of Police Security Detail and Jimmy C's, a part in the movie "JFK", and employment with UGI.

3. Violation of Rule 6, Section 3--Public Statements and Appearances: Unauthorized statements to the press and media appearances.

4. Violation of Rule 7, Section 1--Use of Department Property: Unauthorized use of police department telephones for private business use and unauthorized use of department property by Police Security Detail.

5. Violation of Rule 5, Section 2--Associations: Association with a convicted felon.

On May 5, 1994, Saacks appealed to the Civil Service Commission for the City of New Orleans seeking review of his termination from the police department. The matter was assigned by the Civil Service Commission to a Hearing Examiner. The hearing, which was the longest in Civil Service history, commenced on December 8, 1994 and concluded on March 1, 1995.

During the proceedings before the Hearing Examiner, Saacks filed a Motion in Limine seeking to exclude from evidence the documents seized pursuant to the warrantless search of the offices of Saacks and Lt. L.J. Canal in police headquarters. The Hearing Examiner denied the Motion in Limine, setting forth his reasons in his Report dated December 20, 1994. (App. A-141.)

Following the hearing, on April 20, 1995, the Hearing Examiner rendered a lengthy report (App. A-98), exonerating Saacks from all charges, and finding that the Appointing Authority (the Police Department) had failed to prove

grounds for the disciplinary action taken against appellant. The report contained a recommendation that appellant be reinstated to his former position with all back pay.

Proceedings before the Civil Service Commission

The report was submitted to the New Orleans Civil Service Commission for consideration, and a hearing before the Commission was scheduled.

The Chairman of the Civil Service Commission at the time of appellant's hearing was Sidney H. Cates, IV. During the hearing, appellant orally raised the issue of recusal of Mr. Cates based on Mr. Cates' previous legal representation of Chief Orticke in a divorce proceeding, and the fact that both attorneys for the Appointing Authority had previously been employed in Mr. Cates' law firm. After a brief discussion of the issue, counsel for appellant withdrew the motion to recuse Mr. Cates at that time.

However, on July 13, 1996, after the conclusion of the hearing and the rendering of the hearing examiner's report, but prior to the decision of the Civil Service Commission, Saacks filed a written motion to recuse Commissioner Sidney Cates. In this motion, Saacks noted that he had just learned that Mr. Cates and his law firm, Carter and Cates, was under contract to perform legal work for the City of New Orleans. This contract provided substantial fees for Mr. Cates in consideration of his representation of the City in matters regarding utility rates, and therefore, Saacks urged, Mr. Cates could not render an unbiased decision in the civil service matter. After a hearing and oral argument, during which time Mr. Cates admitted that his firm did represent the City, (See Tape of Hearing, Record, Exhibit "A") the Commission nevertheless denied the Motion to Recuse.

On July 19, 1995, the Civil Service Commission, sitting *en banc*, rendered a decision which deviated from the report of the hearing examiner and upheld the disciplinary action imposed by the Appointing Authority (the Police Department). Mr. Cates participated in the majority opinion

of the Commission along with two other members of the Commission, G.M. Elie and Glenda Jones-Harris. One member, William R. Forrester, Jr., concurred in the decision but recommended demotion rather than termination. The final member, John P. Nelson, dissented from the majority decision. As such, Mr. Cates' vote was the deciding vote.

The decision of the Commission (App. A-65) sustained the following charges brought by the Appointing Authority:

1. Rule 2, Section 1, Adherence to Law; Rule 4, Section 4, Neglect of Duty
2. Rule 6, Section 3, Public Statements and Appearances
3. Rule 7, Section 1, Use of Departmental Property

The Commission found that these violations supported the disciplinary action of termination imposed on Saacks by the Appointing Authority. However, the majority of the Commission was unable to find any violations regarding allegations concerning ownership of "Jimmy C's Sports Bar", Saacks' participation in the movie "JFK" or his alleged association with a felon, and these charges were not sustained.

Two members of the Commission disagreed with this opinion. One member, William Forrester, found that termination was unwarranted, but preferred suspension and demotion. Another member, John P. Nelson, strongly dissented from the majority opinion with lengthy reasons. Commissioner Nelson found no basis for appellant's discharge and determined that appellant should be reinstated to his former position with all back pay.

Proceedings before the Court of Appeal

Saacks appealed the decision of the Commission to the Fourth Circuit Court of Appeal for the State of Louisiana. On appeal Saacks urged that: 1) the Chairman of the Civil Service Commission erred in failing to recuse himself; 2) the Commission erred in allowing consideration of the documents that were illegally seized from the offices of L.J. Canal and

Antoine Saacks; 3) the Commission erred in not accepting the report of the Hearing Examiner; and 4) the Commission was manifestly erroneous in finding that appellant violated departmental rules and that his actions impaired the efficiency of the department, as required to support his termination.

In its Opinion of November 27, 1996 (App. A-2), the Court of Appeal correctly noted that Commissioner Cates' employment as legal counsel to the City of New Orleans, a party to this proceeding, would indeed be grounds for his recusal. However, because Mr. Cates' actual contract with the City was not part of the record, the Court found no basis to reverse the Commission's denial of Captain Saacks' Motion to Recuse Mr. Cates. The Court stated:

> Assuming a contract for legal representation existed between Mr. Cates or his law firm and the City of New Orleans, there is no doubt that Mr. Cates should have been recused from ruling on this disciplinary matter or any other civil service matter where the City of New Orleans is necessarily one of the litigants. However, the record in this case does not contain the actual contract for legal representation between Mr. Cates or his law firm and the City of New Orleans. In the absence of any specific provision in the City Civil Service Rules requiring recusation, and absent any documentary evidence of a contract between Mr. Cates and the City of New Orleans, we are unable to find that the denial of appellant's motion to recuse requires reversal of the Commission's decision in this case. (App. A-17)

Regarding the illegal search, seizure and admission into evidence of the documents from the offices of Saacks and Lt. Canal, the Court of Appeal decided that the search was a legal administrative search. The Court stated:

> There is no dispute in this case that OMI did not have probable cause or a search warrant to

conduct the search of these offices. However, in denying Saacks' motion to exclude the documents, the hearing examiner relied on NOPD operations manual ASOP 48, which provides in pertinent part:

> 1. All Department property, including vehicles, lockers, desks and personal property therein, shall be subject to search upon the request of a member acting in a supervisory capacity.
>
> 2. Every reasonable effort shall be made to conduct the search in the presence of the member responsible for or assigned to that property. When the member is not available, the search shall be conducted in the presence of one of the member's supervisors.

Although the hearing examiner found that Saacks and Canal should have been notified of the search, he found that the provisions of the departmental rule were satisfied as their superior, Capt. Henry Aschebrock of IAD, was present during the entire search. We find no error in this ruling. Based on the evidence in the record before us, we find that the search of Saacks and Canal's offices were legal administrative searches, and the hearing examiner did not err in admitting the seized documents into evidence. (App. A-19)

As to the merits, the Court of Appeal overturned the vast majority of the Commission's findings of alleged improprieties by Captain Saacks. However, despite the fact that the Commission never determined that Saacks violated department rules by failing to submit paid detail forms, the Court held that Captain Saacks violated the rules by failing to submit paid detail forms for his alleged employment with Paid Security Details ("PSD") and United Gaming ("UGI".) With respect to the allegations regarding PSD, the Court found,

contrary to the opinion of the Hearing Officer, that Captain Saacks failed to substantiate his allegation that Lt. Canal submitted a paid detail form on his behalf. With regard to the allegations regarding UGI, the Court, contrary to the opinion of the hearing officer, affirmed the conclusions of the Commission that Captain Saacks was employed by UGI, and independently determined that Captain Saacks failed to submit a paid detail form for his work.

As such, the only two violations that the Court of Appeal affirmed were the charges that Saacks failed to submit Paid Detail/Outside Employment forms for PSD and UGI. However, the Court specifically stated in its opinion that "We fail to find evidence sufficient to indicate that Saacks' involvement in the gaming industry or in the detail business affected the performance of his duties with the police department. Rather, the record shows that Saacks had an outstanding record of achievement during his tenure with the department."

After specifically finding that Captain Saacks' alleged violations of department rules did nothing to interfere with his duties, and specifically finding that termination was too harsh a discipline, the Court nevertheless found that the appropriate penalty for his two violations was involuntary retirement effective November 1993.

Saacks petitioned the Court of Appeal for Rehearing and Reconsideration of its decision. On March, 1997, the Court issued a *Per Curiam* Opinion denying reconsideration, except to change the date of Mr. Saacks' involuntary retirement to April 19, 1994. (App. A-64.)

Mr. Saacks submitted an Application for Writs to the Louisiana Supreme Court, seeking discretionary review of the decision of the Court of Appeal and the City Civil Service Commission. The Supreme Court denied the application on May 9, 1997.

REASONS FOR GRANTING THE WRIT

As discussed in detail *infra,* Antoine Saacks, in addition to the unwarranted loss of his 28 year career, suffered egregious violations of his constitutional rights, including his rights to procedural due process, equal protection, and freedom from unreasonable search and seizure.

It is well-established that a permanent, classified civil service employee has a property interest in retaining his position, and that such an employee cannot be terminated without due process of law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Chief Deputy Saacks was denied procedural due process in the instant case by, *inter alia*, the Appointing Authority's refusal to let his counsel speak at his pre-termination hearing, and by the fact that the deciding vote of the Commission upholding his termination was cast by a Commission member engaged in lucrative legal representation of respondent, City of New Orleans.

The state court's decision affirming Saacks' termination under these circumstances is contrary to Amendments V and XIV of the United States Constitution; La. Const. Article I Section 2 and Article X Section 8; and numerous decisions of this Court, including *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823, 54 USLW 4381 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972); and *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927), meriting review.

Moreover, pursuant to United States Constitution Amendments IV and XIV, and Louisiana Constitution Article I Section 5, Deputy Chief Saacks enjoyed the right to be free from unreasonable searches and seizures. This Court has held that government employers and supervisors are subject to the

restraints of the Fourth Amendment when they conduct searches and seizures within their employees' work spaces. *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). Particularly considering that law enforcement officials (who are expected to be well schooled in probable cause and warrants) conducted the search, the OMI agents' warrantless break-in to the offices of Saacks and Lt. Canal, which was made entirely without cause on a "fishing expedition" for evidence, and the admission of the documents that were seized into evidence, constituted a violation of Saacks' Fourth and Fourteenth Amendment rights. To the extent that New Orleans Police Department ASOP 48 permitted such a search, that provision is unconstitutional.

The state Court of Appeal's decision that the warrantless, suspicion-less search was a legal administrative search contravenes Amendments IV and XIV of the United States Constitution; Louisiana Constitution Article I Section 5; and numerous decisions of this Court, including *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

Finally, under the Louisiana Constitution, a permanently classified civil service employee may be disciplined by an appointing authority only for legal "cause" expressed in writing. La. Const. art. X Section 8. Legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which the employee is engaged. *Cittadino v. Department of Police*, 558 So.2d 1311 (La. App. 4th Cir. 1990). The punishment imposed must be commensurate with the dereliction. *Walters v. Department of Police*, 454 So.2d 106 (La. 1984).

Considering, as the Court of Appeal admitted, that Saacks' alleged failure to submit two Paid Detail/Outside Employment forms did not "impair the efficiency of the department," and that failure to submit these forms was considered a minor offense, if any, when committed by other

members, including higher ranking officers, the Court of Appeal's decision that Saacks' alleged failure to submit two Paid Detail/Outside Employment warranted his involuntary retirement contravenes Amendment XIV of the United States Constitution and La. Const. art. X Section 8.

A. CONSIDERING THAT THE DECIDING VOTE TERMINATING PETITIONER'S EMPLOYMENT WAS CAST BY A COMMISSIONER WITH LUCRATIVE EMPLOYMENT AS COUNSEL FOR THE CITY, THE COURT OF APPEAL'S DECISION AFFIRMING THE DENIAL OF PETITIONER'S MOTION TO RECUSE AND HIS TERMINATION IS CONTRARY TO AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION; LA. CONST. ARTICLE I SECTION 2 AND ARTICLE X SECTION 8; AND NUMEROUS DECISIONS OF THIS COURT, MERITING REVIEW.

It is well-established that a permanent, classified civil service employee has a property interest in retaining his position, and that such an employee cannot be terminated without due process of law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Chief Deputy Saacks was denied procedural due process in the instant case by, *inter alia*, the Appointing Authority's refusal to let his counsel speak at his pre-termination hearing, and by the fact that the deciding vote of the Commission upholding his termination was cast by a Commission member engaged in lucrative legal representation of the defendant, City of New Orleans.[1]

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[1] There were numerous other irregularities relating to this investigation. Chief Saacks was not presented with any supporting documentation at the pre-termination hearing. Tr., January 11, 1995, p. 359; January 6, 1995, January 7, 1995, p. 201-202; February 8, 1995, p. 278. Capt. Aschebrock stated that he did not

In its Opinion of November 27, 1996 in this case, the Court of Appeal correctly noted that Commissioner Cates' employment as legal counsel to the City of New Orleans, a party to this proceeding, would indeed be grounds for his recusal. However, because Mr. Cates' "actual contract with the City" was not part of the record before the Court, the Court found no basis to reverse the Commission's denial of Captain Saacks' Motion to Recuse Mr. Cates. This decision was error, for two reasons discussed *infra.*

1. **As evidenced by Commissioner Cates' own admission of record and reported appellate decisions, it is uncontroverted that Sidney Cates and his law firm represent the City of New Orleans.**

First of all, evidence of Mr. Cates and his law firm's lucrative employment as counsel for the City of New Orleans was in fact part of the record below; Mr. Cates admitted to such employment in a taped session before the Commission, and the tape of that session is in the Record, marked as Exhibit "A."

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recall anything other than the pre-termination letter being shown to Saacks. Tr., January 5, 1995, p. 211.

Further, at the pre-termination hearing Saacks' attorneys were prohibited from making any statements on his behalf. Ron Canatella, who attended hundreds of pre-termination hearings testified that attorneys had always been permitted to speak at the pre-termination hearing. Tr., February 8, 1995, p. 271-227. Ultimately, Canatella described the entire OMI investigation as "a joke compared to what was usual." Tr., February 8, 1995, p. 278. Canatella candidly explained that "from early on, it was clear that it was a witch hunt." Id. p. 280. He testified that "it was clear that they were trying to build a case based on allegations that they had nothing to substantiate." Canatella stated that "none of the allegations had any foundation." Id. p. 297. These "irregularities" violated Saacks' right to due process and equal protection.

Moreover, in numerous prior reported appellate decisions, many rendered by the Fourth Circuit, Mr. Cates and his firm are listed as counsel of record for the City. Of primary import is the decision in *Charles Saden v. Michael Kirby, Sewerage and Water Board of New Orleans, and Plaquemines Parish*, 93-0735 (La.App. 4 Cir. 3/15/94), 635 So.2d 277, *affirmed* 660 So.2d 423 (La. 9/5/95), in which Mr. Cates and his firm are listed as counsel representing the City of New Orleans Sewerage and Water Board. As demonstrated by the date of the Supreme Court's Opinion in that case, the case was still in progress in July of 1995, at the exact time the Commission rendered its decision in this case.

In sum, Mr. Cates' admission of record, and *Charles Saden v. Michael Kirby, Sewerage and Water Board of New Orleans, and Plaquemines Parish, supra,* the reported decision of the same Court, of which the Court should have taken judicial notice,[2] demonstrate without question that Mr. Cates and his firm were in fact employed by the City at the very time the Commission rendered its decision in favor of the City.

2. Commissioner Cates' participation in the decision in favor of the City of New Orleans (which Saacks lost by one vote) violated Saacks' rights to procedural due process.

Considering the undisputed proof that Mr. Cates and his firm did indeed provide ongoing legal services for the City of New Orleans, a litigant herein, Mr. Cates' participation in the

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[2] It is well established that a court may take judicial notice of its own records. In *Chrysler Credit Corp. v. Henry*, 221 So.2d 529 (La.App. 4 Cir. 1969) the Court stated that ".. it is a fact that a court of law may take judicial notice of its own records..." *Chrysler Credit Corp. v. Henry, supra*, 221 So.2d at 534. See also *Investors Homestead Ass'n v. Anglada*, 192 So. 69, 193 La. 596 (La. 1939), where the Louisiana Supreme Court took judicial notice of its own prior opinions.

decision in favor of the City of New Orleans (which Captain Saacks lost by one vote) was an egregious violation of Captain Saacks' rights to procedural due process, under which he is entitled to a fair hearing before an impartial tribunal. Louisiana Const. Art. 1 § 2, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Wilson v. City of New Orleans*, 479 So.2d 891 (La. 1985).

In Judge Friendly's article, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267 (1975), the noted Judge discussed the procedural safeguards demanded by due process prior to a deprivation of rights. Those factors, which were listed generally in order of priority, include: (1) An unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why the proposed action should not be taken; (4-6) the right to call witnesses, to know the evidence against one, and to have decision based only on the evidence presented; (7) counsel; (8-9) the making of a record and a statement of reasons; (10) public attendance; and (11) judicial review. Id. at 1279-95 (emphasis added.)

As this Court has stated, the Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. *Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610, 446 U.S. 238, 64 L.Ed.2d 182 (1980). Due process requires a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972). The same rule applies when a legislature delegates adjudicative functions to a private party. See e.g., *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982).

It is the general rule that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided. *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927). Moreover, "justice must satisfy the appearance of justice," *Offutt v.*

United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), "and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc., supra*, 446 U.S., at 243, 100 S.Ct., at 1613; *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. *Ward, supra*, 409 U.S., at 61, 93 S.Ct. at 83. Under these authorities, Mr. Saacks' due process rights to a fair hearing before a fair tribunal were clearly violated by the presence of a financially interested Commissioner. Without that one vote, Mr. Saacks would still have his job.

In sum, the state court's decision affirming Saacks' termination under these circumstances is contrary to Amendments V and XIV of the United States Constitution; La. Const. Article I Section 2 and Article X Section 8; and numerous decisions of this Court, including *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823, 54 USLW 4381 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972); and *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927), meriting review, reversal of the Commission's decision, and reinstatement of Saacks' employment.[3]

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[3] Louisiana Courts have held that a violation of a police officer's due process rights (specifically, the Commission's refusal to provide the terminated officer a fair hearing and an inexplicable loss of crucial evidence) warranted outright reversal of the Civil Service Commission's decision terminating his employment, and reinstating his position. *Sciortino v. Department of Police*, 94-0356 (La.App. 4 Cir. 9/29/94), 643 So.2d 841.

B. THE COURT OF APPEAL'S DECISION THAT THE WARRANTLESS AND SUSPICION-LESS SEARCH OF PETITIONER'S OFFICE WAS LEGAL CONTRAVENES AMENDMENTS IV AND XIV OF THE UNITED STATES CONSTITUTION; LA. CONST. ARTICLE I SECTION 5; AND NUMEROUS DECISIONS OF THIS COURT, MERITING REVIEW.

Pursuant to United States Constitution Amendments IV and XIV, and Louisiana Constitution Article I Section 5 Deputy Chief Saacks enjoyed the right to freedom from unreasonable searches and seizures, and the right to privacy.[4] This Court has held that government employers and supervisors are subject to the restraints of the Fourth Amendment when they conduct searches and seizures within their employees' work spaces. *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

A search or seizure is usually not considered to be consistent with the Fourth Amendment unless it is conducted pursuant to a warrant issued upon probable cause, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 2390-91, 132 L.Ed.2d 564 (1995). In the instant matter, as the Court of Appeal recognized, "[t]here is no dispute in this case that OMI did not have probable cause or a search warrant to conduct the search of [Capt. Saacks' and Lt. Canals'] offices." App. A-19.

1. Particularly considering that the search was conducted by law enforcement officials, this was not

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[4] The Louisiana Constitution does not duplicate the Fourth Amendment, but rather extends protection to all invasions of privacy, which is as a general concept broader than the unreasonable search and seizures proscribed by the federal bill of rights. *Orfanello v. Laurente*, 626 So.2d 417, 418 (La. App. 4 Cir. 1993).

a "special needs" case permitting a warrantless search.

This Court has developed exceptions to the warrant and probable cause requirement in exceptional circumstances when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Vernonia, supra,* 515 U.S. 646, 115 S.Ct. at 2391 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987). In "special needs" cases, the Court applies a balancing test to determine if a search or seizure is reasonable and thus constitutional. See *O'Connor v. Ortega*, 480 U.S. 709, 725, 107 S.Ct. 1492, 1501, 94 L.Ed.2d 714 (1986) (plurality); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

Petitioner submits that this is not a "special needs" case, and that a warrant should have been procured prior to the search of his office. The Police Department and OMI conducted the search, and, as law enforcement officials, they were well versed in the requirements of probable cause, and knew how to quickly obtain a warrant. As this Court has stated several times, "law enforcement officials are expected to 'schoo[l] themselves in the niceties of probable cause,'" *Ortega, supra,* quoting *New Jersey v. T.L.O., supra*, 469 U.S., at 343, 105 S.Ct., at 743. Clearly, in this case, these law enforcement officials did not seek a warrant because they had absolutely no cause to obtain a warrant. They were on a "fishing expedition," and were well aware that no neutral judge or magistrate would authorize a warrant in such a case.

2. Even assuming that a warrant was not required, the search was unreasonable in its inception and its scope.

Even if this Court considers this a "special needs" case, the search in question was entirely unreasonable. In *Ortega, supra,* a "special needs" case, this Court held that a public employers' intrusions on the constitutionally protected privacy

interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under the specific circumstances of the case. Under this standard, both the inception and the scope of the intrusion must be reasonable.

This Court in *Ortega, supra,* held that a search of an employee's office by a supervisor may be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct. The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of... the nature of the [misconduct]." *Ortega, supra,* quoting *New Jersey v. T.L.O., supra,* at 469 U.S., at 342, 105 S.Ct., at 743. As discussed *infra,* the search at issue was unreasonable in both its inception and its scope.

Chief Orticke stated that he authorized the search after considering an anonymous, unsupported tip. *Tr., December 19, 1994, p. 150-153.* However, the anonymous "tip" did not accuse Saacks of any wrongdoing! At the evidentiary hearing on Petitioner's Motion in Limine, the OMI officers attempted to support their decision to raid the offices by claiming that they had probable cause and exigent circumstances. However, all of the witnesses, including the OMI director, Peter Munster, candidly testified that they were looking for anything that could support charges that the subjects of the search engaged in improper police conduct, rather than looking for any specific items. Further, when trying to account for what they were searching, the officers stated their purpose extended to virtually anything they could find.

One OMI investigator stated that prior to the raid, there was a meeting at which the OMI investigators discussed various options about how to enter the offices, but that he had absolutely no idea what he was looking for once he gained

access to the offices. Internal Affairs (IAD) Director Henry Aschebrock, vividly recounted the intention of the OMI to look around the offices, and if they found anything evidencing illegal activity, to leave the documents and then obtain a search warrant. *Tr., December 19, 1994, p. 214.* This clearly exhibits a "fishing expedition" rather than reasonable cause.

Ironically, the OMI attempted to justify this outrageous raid by stating that they feared losing the documents over the upcoming holiday weekend. However, Captain Saacks was already suspended and prohibited from entering Headquarters and Lt. Canal was extremely ill and certainly not in any condition to be carting boxes of documents out of the offices. Thus, the OMI's concocted rationale simply did not support their search. Rather, they proceeded blindly, in an attempt to locate "anything" they could use as support for the improper suspension and subsequent termination of Chief Saacks. Such conduct clearly cannot support the requirement that the search be reasonable in its inception.

Nor was the search reasonable in its scope. The OMI investigators admitted to rifling through the officers' offices, including their desks, file cabinets, briefcases and even refrigerators, during the course of their "fishing-expedition." They copied approximately 500 documents and then placed the original documents in a box allegedly left with a third party without even requesting a receipt. Hearing Examiner's Evid. Ruling, p. 6. (App. F.) The original documents were never found. These investigators, who characterized this investigation as extremely serious and important, nevertheless disregarded all requirements regarding the chain of command over the documents.[5]

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[5] Further, many of the copied documents were altered and notes in an unidentified handwriting appear on many others. Admission of these suspect documents severely tainted the administrative process. The totality of the circumstances reveals that the entire investigative process undertaken by the OMI was clearly in bad faith.

Captain Aschebrock, an attorney who also functions as in-house counsel for the NOPD, suggested options to the OMI directors regarding the proper means to search the offices and the requirements for chain of command over any seized documents. Examples of these suggestions included sealing or guarding the office while obtaining a warrant, or at the very least keeping the originals and issuing a receipt to the officers. These suggestions were not followed.

As such, the search was clearly unreasonable under all the circumstances, both in its inception and scope.

3. New Orleans Police Department ASOP 48 did not permit or excuse the illegal search.

The New Orleans Police Department Operations Manual, ASOP 48.0, reads as follows:

> 1. All department property, including vehicles, lockers, desks and personal property therein, shall be subject to search upon request of a member acting in supervisory capacity.
>
> 2. Every reasonable effort shall be made to conduct the search in presence of the member responsible for or assigned to that property. When the member is not available, the search shall be conducted in the presence of one of the member's supervisors.

ASOP 48 establishes the parameters that apply when the Department conducts a search. However, OMI did not follow the rule. The search included far more than "vehicles, lockers and desks." The investigators also searched file cabinets, personal briefcases, refrigerators, and they attempted to access Lt. Canal's personal, locked safe.

Nevertheless, the state courts wrongfully denied petitioner's motion to limit the admissibility of these copies pursuant to Louisiana Code of Evidence Art. 1004, which states that if the proponent of a document has lost or destroyed the original in bad faith, then a copy should not be introduced.

Furthermore, neither the OMI nor the IAD even attempted to contact the targeted officers, as required by ASOP 48. Hearing Examiner's Evid. Ruling, p. 7. It is abundantly clear that the investigators' raid did not comply with ASOP 48.0.

Regardless of ASOP 48, the employment relationship between Captain Saacks and NOPD cannot permit the government agency to impose unconstitutional conditions upon employment. The government cannot undertake illegal searches of its employees simply by making consent a condition of employment. Unfortunately, however, the New Orleans Police department apparently considers the relinquishment of one's constitutional rights as a condition of employment. *Tr., December 19, 1994, p 217.*

In sum, the OMI agents' warrantless and suspicion-less break-in to the offices of Saacks and Lt. Canal, which was made entirely without cause on a "fishing expedition" for evidence, in violation of ASOP 48, and the admission of the documents that were seized into evidence, constituted a violation of Saacks' Fourth and Fourteenth Amendment rights and a violation of his right to privacy under the Louisiana Constitution. To the extent that ASOP 48 permitted such a search, that provision is unconstitutional.

C. CONSIDERING THAT SAACKS' ALLEGED FAILURE TO SUBMIT TWO PAID DETAIL/OUTSIDE EMPLOYMENT FORMS DID NOT "IMPAIR THE EFFICIENCY OF THE DEPARTMENT," AND THAT FAILURE TO SUBMIT THESE FORMS WAS CONSIDERED A MINOR OFFENSE, THE COURT OF APPEAL'S DECISION THAT SAACKS' FAILURE TO SUBMIT PAID DETAIL/OUTSIDE EMPLOYMENT FORMS WARRANTED INVOLUNTARY RETIREMENT CONTRAVENES AMENDMENT XIV OF THE UNITED STATES CONSTITUTION; LA. CONST. ART. X SECTION 8; AND NUMEROUS JUDICIAL DECISIONS, MERITING REVIEW.

Article X Section 8 of the Louisiana Constitution provides that no disciplinary actions shall be taken against a permanent, classified civil service employee except for "cause expressed in writing." Legal cause exists whenever an employee's conduct impairs the efficiency of the public service in which the employee is engaged. *Cittadino v. Department of Police*, 558 So.2d 1311 (La. App. 4th Cir. 1990). The punishment imposed must be commensurate with the dereliction. *Walters v. Department of Police*, 454 So.2d 106 (La. 1984). In *Reboul v Department of Police*, 420 So.2d 491, 495 (La. App. 4th Cir. 1982) the court stated:

> Dismissal is The most severe of disciplinary actions that can be taken by the appointing authority. The appointing authority must not only prove the cumulated charges or "incidents", but must prove that they resulted in a detrimental effect on the efficient operation of the department. Adverse publicity coupled with unproven allegations or incidents are not sufficient to warrant dismissal.

The Appointing Authority, in this case, the City of New Orleans, bore the burden of proving that the charges against Saacks were supported by a preponderance of the evidence. City Civil Service Rule 4.4; La. Const., Art. X. Sec. 8(A); *Department of Social Services v. Schneeweiss*, 588 So 2d 1185, 1186 (La. App. 1st. Cir. 1991); *Rodriguez v Board of Commissioners, Port of New Orleans*, 344 So 2d 436 (La. App. 4th Cir. 1977). In addition, the Department had to show that 'the conduct complained of impair[ed] the efficiency of the public service and [bore] a substantial relationship to the efficient operation of the public service in which the employee was engaged." *Montgomery v. Department of Streets*, 593 So.2d 1352 (La. App. 4th Cir. 1992) *quoting Ennis v Department of Public Safety and Corrections*, 558 So.2d 617 (La. App. 1st Cir. 1990.) Disciplinary action by the Civil Service Commission will be deemed arbitrary and capricious

unless there is a real and substantial relationship between the improper conduct and the "efficient operation" of the appointing authority. *Newman v. Department of Fire*, 425 So.2d 753, 754 (La. 1983).

In the instant case, these standards were completely ignored.

1. Captain Saacks did not violate ASOP 85.

The state Court of Appeal overturned the vast majority of the City Civil Service Commission's findings of alleged improprieties by Captain Saacks. The Court of Appeal held only that Captain Saacks violated ASOP 85 by failing to submit paid detail forms for his alleged employment with Paid Security Details ("PSD") and United Gaming ("UGI".)

With respect to the allegations regarding PSD, the Court found, contrary to the opinion of the Hearing Officer, that Captain Saacks failed to substantiate his allegation that Lt. Canal submitted a paid detail form on his behalf. With regard to the allegations regarding UGI, the Court, contrary to the opinion of the hearing officer, affirmed the conclusions of the Commission that Captain Saacks was employed by UGI, and independently determined that Captain Saacks failed to submit a paid detail form for his work.

The Court could not reasonably lend any weight to the alleged fact that the City could not locate Saacks' Private Detail/Outside Employment form for PSD. Voluminous testimony indicates that the Department's handling and storage system for the forms is haphazard at best. Many of the City's witnesses insisted that they had submitted forms, but that their forms had mysteriously disappeared. These witnesses included Chief Orticke, who owned a washateria, and Chief Taylor who owned a grocery store.

All witnesses testified that an officer only needed a detail or outside employment form once an officer actually began work with a company. United Gaming officials and Antoine Saacks testified that **Antoine Saacks never worked for United Gaming.** *Tr. February 10, 1995, p. 115, 239 &*

245. Even the OMI was quick to concede that Saacks never worked for the company. *Tr., December 29, 1994, p. 190.*

Moreover, Petitioner did obtain the requisite Paid Detail/Outside Employment forms for UGI. Appellant's Exhibits 45 & 52 contain copies of Saacks' detail forms signed by Arnesta Taylor. At the hearing Taylor definitively testified that the signatures on both forms were absolutely his. *Tr., January 4, 1995, p. 55.* Deputy Chief Saacks had the unconditional approval of Chief Taylor to provide consultation services to United Gaming Inc. Clearly, Saacks fulfilled the letter and spirit of ASOP 85.

2. Even assuming a violation of ASOP 85, there was no legal cause for termination of Saacks' employment.

The Court of Appeal specifically stated in its opinion that "We fail to find evidence sufficient to indicate that Saacks' involvement in the gaming industry or in the detail business affected the performance of his duties with the police department. Rather, the record shows that Saacks had an outstanding record of achievement during his tenure with the department." After specifically finding that Captain Saacks' alleged violations of department rules did nothing to interfere with his duties, the Court nevertheless found that the appropriate penalty was involuntary retirement, which is still termination of employment.

There was not a shred of evidence that Saacks' alleged failure to submit paid detail forms in any way affected the efficient operation of the Department. Accordingly, the Court's decision upholding termination violates Mr. Saacks' rights as a classified civil servant.

Chief Taylor, the Chief during the alleged improprieties, explained that although the OMI failed to consult him, he knew of nothing that affected the efficiency of the police department and that would be his criteria before charging an officer with a violation. *Tr., January 4, 1995, p. 54, 65-66.* Chief Taylor stated that in this particular case he would not

have discharged Antoine Saacks because it neither affected his efficiency as a police officer nor did it affect or damage the NOPD image. *Tr., January 5, 1995, p. 59 & 88.* Chief Taylor stated that if he had been the Superintendent, when the OMI presented these charges, he **would not have dismissed** Chief Saacks. *Id.* Ultimately Chief Taylor was puzzled about why Chief Saacks was terminated. *Id., p. 66.*

Captain Genovese told the examiner that the operation of Police Security Detail, Inc. **absolutely** did not affect the efficiency of the police department. *Tr., January 31, 1995, p. 190.* Deputy Chief Stephen Rodriguez stated that he did not know of any actions taken by Saacks that had affected the efficiency of the police department. *Tr., February 9, 1995, p. 48.* Major Howard Robertson agreed with the above testimony and added that while Saacks was a Deputy Chief, "he was one of the best [NOPD] ever had." *Tr., February 9, 1995, p. 72.* Finally, Agent Mehrtens was asked to explain how the operation of Police Security Detail, Inc. might have affected the efficiency of the police department. He candidly told the examiner that he could not supply any evidence, documentation, or any testimony that would support such a charge. *Tr., December 29, 1994, p. 141.*

Chief Orticke conceded that Saacks was a good police officer. *Id., p. 189.* He further agreed that before the MCC's allegations, he had no information to suggest that Antoine Saacks had done anything to affect the efficiency of the Department. *Tr., January 20, 1995, p. 194.* Even Mayor Barthelemy testified that before the MCC's allegations he would not have considered Antoine Saacks to have been neglectful of his duties or that any of his actions affected the efficiency of the NOPD. *Tr., February 8, 1995, p. 61 & 213.* Had the OMI conferred with the usual NOPD investigative body, the IAD, they would have been directed that **none of the above charges affected the efficiency of the police department.** *Tr., January 5, 1995, p. 236-237.* That litmus test is key before enacting any disciplinary action.

3. The discipline was not commensurate with the alleged infraction

There is not one single reported case wherein an officer's failure to submit paid detail forms was considered to affect the efficiency of the department or to justify any discipline. Under no circumstances has such a failure ever warranted termination or involuntary retirement. The evidence shows that the remedy when the forms are not submitted is simply to require the officer to submit the forms after the fact.

Captain Robert Hecker submitted a detail form for operating a similar detail company only after Saacks was suspended. Prior to Saacks' termination Captain Hecker never thought he needed to submit a form. *Tr. p. 230-231.* Captain Hecker was never reprimanded for his failure to file a form. Major Serpas, who has since been promoted to the position of Deputy Chief with NOPD, was the other officer whose office was raided. He was charged with failure to have a form to operate a detail company similar in operation to PSD. Ultimately he was suspended for three days, and that discipline was later reversed by the City Civil Service Commission. Moreover, two former Chiefs of Police had no forms on record, and no discipline was imposed.

It is clearly apparent that the Appellant has been subject to grossly disparate treatment, far removed from the usual practices of the NOPD and the punishment administered by the Civil Service Commission and upheld by the Court of Appeal. This difference in treatment is unconstitutional and prohibited by the Equal Protection Clause.

Considering that there was no cause for termination, which the Court found too harsh a penalty, the Court of Appeal should have ordered Saacks' reinstatement. Involuntary retirement is *de facto* termination, and Captain Saacks has been deprived of his employment without cause.

CONCLUSION

For the foregoing reasons, Petitioner Antoine Saacks, Jr., respectfully submits that this Court should issue a writ to review the decision of the Louisiana Fourth Circuit Court of Appeal, and after due proceedings had, reverse the decision of the Court of Appeal and the Civil Service Commission, and order that Antoine Saacks be reinstated to his employment with back pay, costs and attorney's fees.

Respectfully submitted,

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